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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED, UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.,
Respondents.

REPLY BRIEF OF PETITIONER, PULLMAN-STANDARD

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

I. THE BONA FIDES TO BE EVALUATED IS THAT OF PULLMAN AND THE USW IN REACHING THEIR AGREEMENT ON SENIORITY RULES; THE EXISTENCE OF SEPARATE BARGAINING UNITS WAS NOT A PART OF THEIR SENIORITY SYSTEM AND ALLEGED MOTIVES OF THE IAM OR NLRB ARE NOT RELEVANT TO THAT INQUIRY. 1

II. ANY INFERENCE ABOUT MOTIVATION FROM THE DIVISION OF CERTAIN DEPARTMENTS OCCASIONED BY THE IAM CERTIFICATION AND MODIFICATION THEREOF FOR PRACTICAL PURPOSES IS DISSIPATED BY LATER SENIORITY UNIT MERGERS. 10

III. APPENDIX A TO RESPONDENTS' BRIEF CONTAINS NOTHING DETRACTING FROM THE BONA FIDES OF THE PULLMAN-USW SENIORITY SYSTEM. 11

IV. APPENDIX B TO PETITIONERS' BRIEF IS REPLETE WITH STATISTICAL MISINFORMATION AND ERRONEOUS METHOD. IN ADDITION THE STATISTICS DISCUSSED ARE ALL PRE-ACT AND WHAT RESPONDENTS SEEK TO PROVE BY THEM IS BESIDE THE POINT OF BONA FIDES. 13

V. THE DISTRICT COURT'S FINDINGS OF PULLMAN'S COMPLIANCE WITH TITLE VII WERE SUPPORTED BY A FULL AND COMPLETE RECORD. 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 1, 8

Carroll v. United Steelworkers of America, 498 F.Supp. 976 (D. Md. 376, 958-86) 5

Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972).... 4

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*

Taylor v. Mueller Co., — —F.2d ——, 26 FEP Cases 1695 (6th Cir., 1981) 4, 5

United Air Lines v. Evans, 431 U.S. 553 (1971) 4, 7

United States v. TIME-DC, 517 F.2d 299 (5th Cir., 1975) 3, 18

United States v. TIME-DC, 4 FEP Cases 77, (N.D. Tex. 1971) 2

United States v. TIME-DC, Inc., 6 FEP Cases 690, (N.D. Tex. 1972) 3

STATUTES:

Labor-Management Relations Act, 29 USCA § 9(b)... 5

Civil Rights Act of 1964, Title VII as amended, 42 USCA §§ 2000e, et seq. 4, 8, 9, 17

§ 703(h) 2, 4, 6, 7, 18

TEXT:

P. Hoel, *Elementary Statistics* (4th Ed.) 180 16

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REPLY BRIEF OF PETITIONER, PULLMAN-STANDARD

STATEMENT OF THE CASE

ARGUMENT

I. The Bona Fides To Be Evaluated Is That Of Pullman And The USW In Reaching Their Agreement On Seniority Rules: The Existence Of Separate Bargaining Units Was Not A Part Of Their Seniority System And Alleged Motives Of The IAM Or NLRB Are Not Relevant To That Inquiry.

Pullman's main brief, pages 22-26, dealt with the erroneous approach of the Fifth Circuit in lumping together the seniority rules in the Pullman-USW contract and those in the Pullman-IAM contract, and calling this aggregate *the* seniority system, and among other things, pointed out its inconsistency with the definition of "system" approved in *California Brewers Ass'n* v. *Bryant*, 445 U.S. 598, 606, n.15, as a "complex *unity* formed of many often diverse parts subject to a *common plan* or serving a *common purpose.*" (Emphasis added.) Despite the obvious importance of the hypothesis that there was a single seniority system at Bessemer comprising both the USW and

the IAM seniority rules, respondent's brief addresses not a word to the meaning of system or validity of the hypothesis, but begs the question; assumes it without the slightest attempt at rational justification or evidentiary basis.

We believe the seniority rules agreed on in the Pullman-USW collective contracts, modified from time to time, constitute *the* system whose bona fides is to be determined, and that this determination must be made without reference to the alleged "ritual" of the IAM before 1948[1] or the NLRB orders in the '40's defining and modifying the USW and IAM bargaining units. So vital a question simply should not be begged, but both the Fifth Circuit and respondents assume its answer without any attempt to support it or to answer Pullman's contrary arguments.

Further study convinces us more than ever of the soundness of our reasoned conclusion that the seniority system whose bona fides is in question is the seniority rules within the Pullman-USW bargaining unit and contract, and that matters extraneous to that bargaining unit cannot destroy its § 703(h) immunity. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) establishes this by plain implication. Although not mentioned in this Court's opinion, the lower court opinions in the *Teamsters* litigation show there were separate *IAM* bargaining units and contracts at some of the carrier's terminals at which the Teamsters' seniority rules covered over-the-road and city truck drivers.[2]

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[1] This was never introduced into evidence but respondents unsuccessfully sought to have it judicially noticed after conclusion of the third trial and after all parties rested. (Pet. App. 24a, n.1; JA 346-350).

[2] *United States* v. *TIME-DC, Inc.*, 4 FEP Cases 77, 78 (N.D. Tex., 1971):

> "... Employer has ... entered into various labor contracts with approximately 70 local labor unions representing groups

This Court's opinion says the over-the-road drivers, servicemen, and city operators (truckers, hostlers and city drivers) were all "represented by the petitioner" International Brotherhood of Teamsters, 431 U.S. 324, 329, n.3. By elimination, the IAM must have represented the truck mechanics at some terminals. Despite the fact that the IAM had contracts covering truck mechanics at some TIME-DC terminals, the Court's opinion is explicit that the seniority system with whose bona fides it was concerned was the *Teamsters'* nationally bargained[3] system:

> "The petitioner, International Brotherhood of Teamsters (union) was joined as a defendant. . . .

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of employees at different terminals and other facilities throughout the United States. . . .

"It has been further pointed out that Local 745 is a local of the International Teamsters Union while some of the contracts are with locals of the International Machinists Union. . . ."

United States v. *TIME-DC, Inc.*, 6 FEP Cases 690 (N.D. Tex., 1972):

". . . The International Association of Machinists and Aerospace Workers, AFL-CIO was joined as a defendant . . . on April 21, 1971."

United States v. *TIME-DC, Inc.*, 517 F.2d 299, 303 (5th Cir., 1975):

". . . The International Association of Machinists and Aerospace Workers was subsequently joined as a defendant. . . ."

". . . TIME-DC has signed a total of 124 separate collective bargaining agreements with 83 individual Teamster locals at its various terminals. Each contract consists of three basic parts, the National Master Freight Agreement, an Area Supplement and Local Riders or Addenda. . . ."

[3] In footnote 59 (431 U.S. at 372) there is a detailed discussion of seniority rules contained in the Teamsters' National Master Freight Agreement and Southern Conference Area Over-The-Road Supplemental Agreement. There is no mention of any IAM agreement, seniority rules, or jobs covered thereby. The Court referred to "The city drivers and servicemen who are discouraged from transferring to line driver jobs. . . ." 431 U.S. at 356. It does not mention mechanics.

"The District Court and the Court of Appeals also found that *the seniority system contained in the collective bargaining agreements between the company and the union* operated to violate Title VII. . . .

"Accordingly, this . . . was held to constitute a continuing violation of Title VII, for which both the *employer and the union who jointly created and maintain the seniority system were liable.* . . .

"Because *the seniority system* was protected by § 703(h), *the union's* conduct agreeing to and maintaining the system did not violate Title VII." (431 U.S. at 329, 343, 344-45, 356; emphasis added.)

The Court discussed the TIME-DC-Teamsters system and its freedom from illegal purpose. It did not take judicial notice of the pre-1948 ritual, allegedly racist, of the IAM; it did not take judicial notice that craft unions used to discriminate against blacks; it did not discuss the motives of the IAM in seeking separate craft units or those of the NLRB in certifying them. It did not do any of the things respondents seek to have it do herein. In short, this Court dealt with the Teamsters seniority system at TIME-DC as separate and distinct from the IAM's system or systems there, which is as it should be.[4] Pullman and the USW

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[4] This is also implicit in *United Air Lines* v. *Evans*, 431 U.S. 553, where the seniority system was described as contained in "the collective bargaining agreement between United and the Air Line Stewardesses and Flight Stewards" (431 U.S. at 555, n.6) without any reference being made to United's pilots, flight engineers, ticket agents, baggage handlers, etc. It is implicit in decisions of most of the Courts for Appeal; for example, compare *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir., 1972) with *Taylor* v. *Mueller Co.*, —— F.2d ——, 26 FEP Cases 1695 (6th Cir., 1981). These cases involved the same plant in Chattanooga where there was a USW bargaining unit covering the foundry, assembly, and shipping departments; and an IAM bargaining unit covering the machine division, which was divided into machine shop, maintenance, tool room and service departments. Both units had a regime of departmental seniority. In *Heard* the USW rules were held to constitute a bona fide seniority

should not be charged with the actions or motives of the IAM here any more than this was done in *Teamsters.*[5]

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system; and in *Taylor* the IAM rules were held to constitute a separate bona fide seniority system. Neither case refers to the other system or considers the motivation of one union as having any bearing on the other's system, even though it was found that "Prior to 1963 [the IAM] prohibited blacks from becoming union members." 26 FEP Cases at 1697. Thus each system was held to be coextensive with the collective bargaining which created it. See also *Carroll* v. *United Steelworkers of America,* 498 F.Supp. 976 (D. Md. 376, 985-86) ("Since . . . the basic framework of the seniority system at the Sparrows Point plant has been developed on an industry-wide basis, the examination of the motivation . . . of the industry wide seniority system must be on an industry wide basis.") This case suggests that the scope of USW-Pullman seniority system should be viewed as coextensive with the USW bargaining units at all three plants at Bessemer, Butler and Hammond, which is also suggested by *Teamsters* and inconsistent with the Fifth Circuit's approach.

[5] We do not wish to be understood as conceding any impropriety was shown as to the IAM. All the evidence of record showed none. It was only long after both cases rested after three trials and some 20 trial days that respondents sought, unsuccessfully, to have the District Court take judicial notice of a pre-1948 "ritual" of the IAM, evidently an initiation ceremony, in which the proselyte allegedly undertook to nominate for membership only qualified white machinists. In *Taylor* v. *Mueller Co.,* —— F.2d ——, FEP Cases (6th Cir., 1981), a comparable restriction on union membership until 1963 was held not to vitiate a departmental seniority system. It is true respondents claim the creation and modification of the IAM bargaining unit in 1941-44 is circumstantial evidence of racial gerrymandering, but that argument runs smack into the Congressional policy (29 USCA § 9(b), that the NLRB might certify craft units. For if it be true as respondents argue that craft unions such as the IAM (Brief, p. 21, n. 24) were racially discriminatory and that this is a notorious fact which may be judicially noticed, and that this condemns all the seniority rules in a plant, where part of it is in a craft unit, the result would be to outlaw all craft bargaining units, and along with them the

The fallacy in the question-begging assumption by the Fifth Circuit and respondents that a "seniority system" under § 703(h) must be coextensive with the plant,[6] is underlined by the undisputed fact that in this record (Pullman's answers to Interrogatories, No. 92, filed January 9, 1973) that since 1956 there was a *third* bargaining unit at Pullman's Bessemer plant, also represented by the USW, consisting of office workers. Why then stop with the IAM? If the respondents can combine the USW production and maintenance unit seniority rules with those of the IAM unit, and call them one seniority system, why not include the USW office workers' unit seniority rules, too?

The answer is simply, as this Court has often pointed out, that this country's national labor policy is firmly rooted in collective bargaining as it is in eliminating racial discrimination, and the institutional framework for barganing as regulated for decades by the NLRB cannot simply be ignored by the Courts any more than Pullman and the USW could have ignored it in the 40's, 50's and 60's. In negotiating their seniority systems, they obeyed the law, in bargaining for the unit the NLRB certified, and they had no real choice in the matter. The objection may well be posed, but if the existence of a separate craft unit is not part of a seniority system, what is it? Even if some improper racial motive entered into its certification what is the current significance of the separate certification? Pullman submits that it is the same as any other ancient

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seniority rules of all other unions in the same plants. This was not done in *Teamsters* and there is no more reason for it here. For although much is sought to be made of two post-certification revisions of the IAM unit, the logic, if any, of respondents' argument would apply to all craft bargaining units even if not revised.

[6] This assumption may be attributable to that court's tenacious failure to recognize that "there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems." *Teamsters*, 431 U.S. at 355, n. 41.

historical event which though it may affect seniority, is not a seniority rule. It was said in *United Air Lines* v. *Evans*, 431 U.S. 553, 558 (1977):

> "Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was *entitled to treat that past act as lawful.* . . . A discriminatory act which is note made the basis for a timely charge is the *legal equivalent of a discriminatory act which occurred before the statute was passed.* It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is *merely an unfortunate event in history which has no present legal consequence.*" (Emphasis added.)

The Court's remarks about "genesis" of seniority systems in *Teamsters* mark the exceptional case in which pre-Act historical events may have present legal consequences. If there were any real evidence that Pullman and the USW actually riggd their seniority rules for the purpose of disadvantaging blacks, it might certainly have present legal consequences, for *bona fides* under § 703(h) apparently has no statute of limitations. Once outside the scope of § 703(h), however, and separate bargaining unit certification is not part of the Pullman-USW seniority system, any more than Mrs. Evans' layoff was, ancient historical events alleged to be discriminatory do not themselves violate the law. In large measure we must take the world as we found it in 1965, the good with the bad, and put a stop to discriminatory acts thereafter. As stated in the legislative history of Title VII quoted in *Teamsters*, 431 U.S. at 350, 110 Cong. Rec. 7213 (1964):

> "*. . . if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.*" (Emphasis the Court's.)

The fact of separate certification of the IAM bargaining unit is fortuitous in the same sense that having built two

separate plants corresponding to those units would be, or having long before 1965 contracted out all of the machine shop and millwright work to a separate employer would be; a historical fact which may be unfortunate, but imposing no Title VII obligations beyond that of filling vacancies as they occur on a non-discriminatory basis.[7] As there were relatively few black craftsmen prior to 1965, for whatever reason, it was the inevitable result of Congress' policy of authorizing craft units that many disproportionately white craft units would be certified.

The courts can, of course, remedy any post-Act events of discrimination by ordering hiring or transfers into the IAM unit with retroactive seniority, to a date not earlier than the effective date of the Act, and back pay, *Teamsters*, 431 U.S. at 357, just as they can among seniority units encompassed in a bona fide seniority system "without attacking the legality of the seniority system as applied to them." 431 U.S. at 347.[8]

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[7] Consider this hypothetical case: An employer with a manufacturing plant in a central city decided pre-Act to build a new plant in a middle class white suburb to house a machine shop department and some other craft functions because of greater availability of labor already having the necessary skills. Assume the USW organizes the old plant and the IAM the new plant thereafter, still pre-Act, and negotiate separate seniority rules. Despite a continuing impact on blacks after 1965, we submit that no one would contend there are not two seniority systems, or that the continued operation of the second plant would violate Title VII. We submit the separate existence here of two separately bargained for units resulting in separate sets of seniority rules is no different in principle. Even if the pre-Act move were based on explicitly racial considerations in this hypothetical situation, it would have to be dealt with as an unfortunate historical event having no present legal consequences. For a plant location decision is certainly not within the "commonly accepted notions [of] a seniority system." *California Brewers* v. *Bryant*, 444 U.S. 598 at 605, 608.

[8] It may be also that the courts and the NLRB may devise other remedies involving separate bargaining units, but these do not in-

Once the allegations of pre-1948 IAM racism are eliminated from the picture, it is perfectly clear that *Teamsters* requires that the bona fides of the Pullman-USW seniority system be sustained. Pre-Act and post-Act discrimination was certainly present in *Teamsters*.[9] There were more than 40 cases of individual post-Act discrimination in *Teamsters*. The evidence in this case failed to show a single instance of post-Act discrimination against an individual black. Instead, it showed Pullman after 1965 was deliberately placing whites in formerly predominantly black departments and vice versa (Pet. App. 130a). At all times Pullman's work force at Bessemer was approximately 50% black although the relevant labor market was only about one-third black. Pullman employed blacks at a statistically significantly higher rate than random hiring would have produced. In all respects the material facts in this case were more favorable to *bona fides* than was the case in *Teamsters*.[10]

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clude striking down the bona fides of a seniority system negotiated between an employer and one union, because of alleged ancient discriminatory conduct by another union.

[9] "The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful discrimination, continuing well beyond the effective date of Title VII. . . .

"Where, because of the employer's prior intentional discrimination the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them . . ." 341 U.S. at 342, 349-350.

[10] There is much objective basis for the District Court's finding that the seniority system was not adopted for disciminatory purposes which remains unanswered because it is unanswerable. For example, if the departmental seniority system was adopted at Bessemer to discriminate against blacks, how is it that the same system was adopted by the same parties at Butler, with fewer than 1% black employees? Why is there an occupational or job classification seniority system, more restrictive than departmental seniority on emloyee transfers and mobility, in the IAM unit since 1947 when for much of that time it was all white? If rigged for

II. Any Inference About Motivation From The Division Of Certain Departments Occasioned By The IAM Certification And Modification Thereof For Practical Purposes Is Dissipated By Later Seniority Unit Mergers.

Respondents argue (Brief, 27-32) that the December, 1941 modification of the USW and IAM certifications (JA 170), by moving the blacks in the Wheel and Axle Department (3 wheel roller laborers, 3 wheel rollers, and 3 wheel roller helpers) (JA 247) into the USW unit, split that Department along racial lines, and moving the 2 tool room men, both whites, into the IAM unit, manifests some sinister racial motivation of "the" seniority system. Even under respondents' improper analysis of the seniority system, such a conclusion is unfounded. In the subsequent June, 1944 modification of the certifications (JA 174-175) these changes were *reversed* so that Wheel & Axle became 39% black (Pet. App. 77a) and the tool room men went back into the racially mixed Steel Erection Department; some others went back into the racially mixed Maintenance Department. Both of these modifications can hardly be part of a sinister plan.[11] If there had been a sinister plan surely it would have occurred to the decision makers at some

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the purpose of discriminating against blacks, why is it that the two largest departments, welding and steel erection, containing over half the work force, have always had large numbers of both races? And the next four largest departments also? (Pet. App. 69a). Why did the USW and Pullman return to departmental seniority from occupational seniority in 1954, resulting in increased employee mobility? The truth is, as the District Court found, the departmental seniority system had nothing to do with any discrimination practiced at Pullman but was inconsistent with whatever may have existed and was the instrument for its rapid elimination in May 1965. (Pet. App. 43a, 134a-135a.)

[11] Not even plaintiffs have contended that the IAM bargaining unit as defined from 1944 on would have been improper if originally certified. Since 1944 it has consisted only of craft employees in the machine shop and millwrights.

point to put the wheel rollers, wheel roller helpers and wheel roller laborers into the functionally related Truck Department (JA 130), but instead the seniority grouping of Wheel & Axle was in effect reintegrated in 1944. Likewise, the return to departmental seniority from occupational seniority in 1951 effected a reintegration of most seniority groupings. The merger of the Paint and Shipping Track Departments in 1954 resulted in increased mobility. The net result is that the deparmental changes do not appear to have been determined by racial considerations, for they went both ways, both toward and away from racial mixing.

III. Appendix A To Respondents' Brief Contains Nothing Detracting From The Bona Fides Of The Pullman-USW Seniority System.

By their Appendix A to their Brief respondents purport to identify errors in the chart appearing at JA 336. The chart is a reduction in size of a much larger chart received in evidence during the 1978 trial. While any one-page summary necessarily involves simplification, the chart fairly and accurately displays the evolution of Pullman's seniority systems.[12]

Plaintiffs state (App. A, 2a) that the chart should reflect two Wheel and Axle Departments between 1942 and 1947. Though unconvinced that the chart is in error (see CDX5), certainly there were two seniority units in the Wheel and Axle Department between 1942 and 1947, one represented

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[12] Plaintiffs correctly point out (App. A, 4a) that the IBEW was decertified in 1946, and that JA 336 shows the date at the top of the fourth column as 1944. However, the original exhibit (CDX 27) contains the correct date, and this error exists only in the chart recreated at JA 336. Unfortunately, although the chart at JA 336 was reviewed prior to printing by all parties who agreed that JA 336 was an accurate recreation of CDX 27, apparently no one noticed the error in JA 336 and JA 336 is due to be corrected to conform to the original exhibit.

by the IAM and one by the USW. We have no objection to a "correction" of the chart to reflect this division of the Wheel and Axle Department since it would then more clearly display the nondiscriminatory intent of the Company and USW by emphasizing that in 1947 when the IAM lost its representation of some Wheel and Axle employees, the Company and USW immediately agreed on one seniority unit covering everyone in the department, black and white.

Contrary to plaintiff's assertion (3a-4a), the record fully supports the existence of the Railroad, Tool Room, Miscellaneous Stores, Truck & Tractor, Steel Stores, and Crane Service Departments between 1942 and 1947. The existence of those departments during this time period is therefore accurately reflected on the chart. The record support appearing at CDX 5 (1978 trial) includes departmental listings on 1941-46 overtime bonus lists, a 1945 list of employees absent on 8/24/45, and a 1946 checkoff list with an attached memorandum. There is no contrary evidence. The district court's finding noted by plaintiffs at JA 34a "although Wheel and Axle and Truck were listed as a single department for cost accounting purposes, for purposes of seniority they are two departments" is fully supported by the overtime bonus lists as well as the other documents in CDX 5.

Plaintiffs' statement at 4a that "the chart mistakenly shows [the Tool Room jobs] being ceded to the Steelworkers from the Electrical Workers' unit in 1944" is in error. The chart shows no such thing. The chart shows the Tool Room being established as a seniority unit in the Steelworkers bargaining unit in 1942, and continuing in that status until 1947 when it was merged into Steel Erection.

Contrary to plaintiff's statement at 5a that "[t]here is no record support for chart delineation of the Air Brake Pipe Shop as a separate departmental seniority unit in the years 1944 to 1946," all three of the separate type documents contained in DX5 specifically show the separate

existence of this department during this time period. Plaintiff's assertion at the bottom of 5a that the Air Brake and Pipe Shop was created by joining two departments, Shipping Track and Steel Erection, is similarly unsupported by the record. Every individual shown on the 1954 seniority list in the re-established Air Brake and Pipe Shop Department, can be traced to 1953 employment in the Steel Erection Department. Compare PX8, PX9, and CDX4. Plaintiff's contention that the Steel Miscellaneous Department "first appeared on a February 1953 seniority list" is similarly in error. The district court's conclusion at Pet. App. 43 that "the Steel Miscellaneous Department owes its separate existence—since 1952—to no apparent reason other than the fact that, prior thereto, there were two work gangs in the Steel Stores Department" is founded on PX 93 and PX 94 (JA 228-229) which specifically identify the date of the forming of this separate department as September 12, 1952. Since the dates used on the chart correspond in general to the dates of collective bargaining agreements, the portrayal of this event as occurring on June 1, 1952, is approximately correct, is more appropriate than any other date shown on the chart, and is misleading to no one.

IV. Appendix B To Petitioners' Brief Is Replete With Statistical Misinformation And Erroneous Method. In Addition The Statistics Discussed Are All Pre-Act And What Respondents Seek To Prove By Them Is Beside The Point Of Bona Fides.

APPENDIX B, Tables 1 and 2

The figures in the three columns headed "No. Workers," "No. Whites," and "No. Blacks" are grossly mistaken insofar as they purport to state the composition of the work force at any point in time. The source of the numbers is not given, but they are ridiculously wrong on slight inspection. The total work force in Table 1 (1964) is said to be 3875, of whom 2550 or 64% were white. The chart at JA 90, shows that employment was never higher than 3000

(Pet. App. 68a, 118a) and in 1964 never exceeded 2500. The chart at Pet. App. 77a and 128a shows a total work force in June, 1965, of 2324 which was 50.5% white. The work force has always been very close to half black (Pet. App. 34a, 120a), never less than 45% (Pet. App. 4a). Table 1 of Appendix B further represents that there were 1853 employees in the Welding Department in 1964 whereas the evidence shows there were never more than a total of about 875 in that department (Pet. App. 77a; P.Ex. 1-10, 1974 Trial). How did such egregious numbers get into Table 1? We confess we are not sure. It is claimed at App. B, p. 7, that the numbers in Table 1 (1964) were taken from P.Ex. 2 (1974 Trial), the seniority list originally typewritten as of June 1, 1964, and revised by handwritten entries to reflect new hires, terminations, transfers, and other changes continuously to July 9, 1965 when a new seniority list came into use. At first we suspected the obviously inflated numbers were derived by counting everyone who worked at all in that 13-plus month period in a department, as was done by respondent's satistical witness in preparing the exhibits for the 1974 trial.[13] However, an accurate count of the data

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[13] 1974 Trial R., 722-725:

"Q. [By Mr. Stelzenmuller] . . . the source of the information in here partly comes from the seniority lists that were furnished to you?

"A. [By Ms. Mitchell] Right.

• • •

"Q. Could I inquire as to how you treated let's say when a name was lined out?

"A. When a name was lined out, I used that name anyway, and the job classification that was lined out.

"Q. . . . [I]n other words the data you have would not represent people working as of a fixed date but . . . all the names that appear on the seniority list?

"A. For that particular year,

"Q. And where a man's name is added in handwriting at the foot, I presume you likewise count that man?

"A. Yes, I did.

"Q. And if he . . . was added and lined out both, you add his name on there?

on P.Ex. 2 for the Welding Department made in that manner accounts for only a small part of the gross errors in counting. That exhibit shows the total number on the Welding Department seniority list on June 1, 1964 was 669 hourly employees, 562 white and 107 black (16.0%). During the year following, there were 350 added, 274 white and 76 black. After May 31, 1965, there were 135 added hourly employees, 118 white and 17 black. The total number of all hourly employees appearing anywhere on this Welding Department list is 1154, 954 white and 200 black (17.3%), but these were not all on the list at the same time.[14] On June 1, 1965, after deletions made as shown in the footnote, there were between 631 and 618 whites, and between 141 and 123 blacks (between 16.3% and 18.6%).[15] On July 2, 1965, the count was 719 white and 137 black (16.0%). Table 1 shows 1655 whites and 198 blacks, which are grossly in error no

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"A. Right.

• • •

"Q. . . . [E]very man's name appears in the department . . . in any form, it would appear on the list in your document, that is, in the count?

"A. Right, every name.

[14] The seniority list shows as deletions those who left the department for various reasons during the 14-month period as follows:

	6/1/64–5/31/65		5/31/65–7/9/65		No date given	
	white	black	white	black	white	black
Quit or failed to report	154	19	16	2	0	0
Discharged	15	3	1	1	0	0
Transferred to other depart.	12	17	0	0	9	15
Deceased	2	0	0	0	0	0
Retired	3	0	0	0	0	0
Other	19	3	0	0	4	3
	205	42	17	3	13	18

[15] The district court counted 678 whites and 161 blacks (19.2%) on this source document (JA 77a, 128a). Possibly a few dozen entries can have two interpretations, but certainly that cannot explain the gross discrepancies in Table 1.

matter who is counted. The District Court (Pet. App. 129a, n.28, 131a, n.29) pointed out that quit rates and personal preference are matters which can lead to non-random makeup of departments. Tables 1 and 2 are thus without much probative value of anything.[16]

What is perhaps the oddest thing about Tables 1 and 2 is their basic irrelevance. No one contends employees were assigned to departments at random prior to 1965. Pullman contended it did not fail to assign any qualified black to any job requiring welding or craft skills, to the point at least of de minimis. The District Court found, and we cannot say it was clearly erroneous, that (Pet. App. 27a, 41a, 51a, 131a):

> "For a number of years—until the arbitration decision in March 1965—there was an informal custom at the plant of keeping certain jobs as 'white only' and others as 'black only.' This practice in turn . . . caused decisions respecting assignments to departments throughout the plant to be infected with racial considerations. . . .
>
> "The seniority system under attack had its genesis—whether viewed as being in 1941-42 or in 1956—at a period when racial segregation was certainly being practiced; but this system was not itself the product of the bias. The system rather came about as a result

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[16] As a matter of statistical method, there is also a basic error in calculating *all* of the figures in the "Chance Probability" columns in Tables 1 and 2. Respondents' calculations of probability are all made in the way appropriate to a "one-tail test" whereas the correct method is for a "two-tail test" which raises the probability by a factor of about 100%. In other words, the one-tail test would be appropriate if the only possibility would be a disproportionately high ratio of blacks in a given department, but if one considers the possibility of a disproportionately high ratio of blacks or whites (two-tailed test), the chances of this happening at random are approximately doubled. (P. Hoel, *Elementary Statistics* (4th Ed.) 180-184). In addition there are quite a few errors in calculating standard deviations and probability in Tables 1 and 2, but they seem so lacking in evidentiary value that we won't enumerate them.

> of colorblind objectives of a union. . . . Nor did it foster the discrimination—of keeping certain jobs as being for one race or the other—which was being practiced by custom in the plant. Indeed, it was this very seniority system which, as a result of arbitration in 1965, provided the means for stopping that discrimination even before the effective date of Title VII. . . .
>
> "Discrimination against blacks . . . was accomplished through the vehicle of reserving many of the 'better' jobs for whites. The departmental seniority system was not adopted with the intent or purpose of protecting whites against blacks. . . .
>
> "Actually . . . a demonstration of segregation in job classifications . . . would have no causal connection with the departmental seniority system, but would be indicative of some other discriminatory practice."

In n.3, Pet. App. 27a, the District Court found:

> "It is not without significance . . . that it was the seniority system itself which in early 1965 provided the means for overturning the practice of job segregation."

Since nobody claims there was a random process, there would be no reason to expect the statistics to reflect a random distribution. The point is, not whether employees were randomly distributed by race (emphatically not true in *Teamsters*, yet held not to defeat *bona fides*) but whether the seniority system was rigged for the purpose of discriminating against blacks.[17] The District Court found there was discrimination and non-random distribution, but that the seniority system was not negotiated for that purpose, just as in *Teamsters*. The fact that the races were not represented randomly in many departments is not sur-

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[17] *Teamsters*, 431 U.S. at 339, n.20:

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practice will result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

prising; what is more significant here is that the vast majority of employees of both races were actually in racially mixed departments; for this indicates positively that such discrimination as may have occurred was of a different nature from segregating the races in different seniority units, just as the District Court found.

In any event, the same statistical phenomena *sought* to be shown by Appendix B were clearly *present* in *Teamsters*, where line drivers were all white (with one isolated exception), yet the seniority system's bona fides was upheld. On the same basis, the most Appendix B could show, if its data and methodology were accurate, is that there was pre-Act discrimination. As clearly held in *Teamsters*, the § 703(h) exception clearly *presupposes* pre-Act discrimination. The bottom line is that charts about the work force in 1956 and 1965, even if accurate, which these are not, cannot mean any more than they did in *Teamsters*.[18]

There are other statistical curiosities in respondents' brief. In general their statistical arguments are of little probative value.[19]

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[18] See charts in *United States* v. *TIME-DC*, 517 F.2d 299 at 312, n.24 and 313, n.25 and 26.

[19] Rather than to reply to every one in detail we believe it is more appropriate to deal with typical examples. Page 55 of respondents' brief asserts the following facts about employees in 1973 in the USW bargaining unit with over six years' seniority:

> "... 551 or 74% of all black employees as compared to 119 or 16% of all white employees earned less than $4.25 an hour, job class 8 or below. JA 65. Moreover, 634 or 81% of all white employees as compared to 192 or 20% of all black employees earned more than $4.40 an hour, job class 10 or above. *Id.* The average hourly basic rate for black employees ... was $4.14 as compared to $4.45 for white employees."

These figures are contradictory. If 74% of all blacks equals 551, then the total number of blacks is 551/.74, or 745. But if 20% of all blacks equals 192, then the total number of blacks equals 192/.20 or 960. Obviously one is in error. Likewise, the figures assert the total number of whites is both 119/.16 or 774 and 634/.81 or 783. Turning to JA 65 which is cited in support of

V. The District Court's Findings Of Pullman's Compliance With Title VII Were Supported By A Full And Complete Record.

The suggestion by respondents' brief (p. 146) that this is a "paper case" is unbecoming. We tried this case for twenty trial days, introducing thousands of pages of live testimony, many depositions, and thousands of documents. The district court lived with the case for years and recognized from the extensive oral evidence the utter vacuousness of the individual claims (Pet. App. 151a-153a, 115a-116a), the surprising sparseness of race-related grievances among the 2,800 grievances filed in 8 years, "together with the near-paranoiac, exaggerated descriptions by those who did have such complaints," (Pet. App 140a, n. 38) the adoption of affirmative action programs in 1969-72 which in significant respects went beyond Pullman's legal obligations (Pet. App. 122a-124a), the rapid progress of blacks after 1965 toward economic equality (Pet. App. 134a), the use of biracial compliance officers to follow through on compliance with the affirmative action program, the highly successful vocational training programs undertaken (Pet. App. 122a), and the rapidity with which the departmental seniority system enabled blacks to move to the highest paid

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these figures, the totals are given there as 753 blacks and 743 whites, which doesn't agree at all with any calculation. More importantly, as found by the district court, Job Class number is at best a rough index of earnings potentials (Pet. App. 127a). For many reasons it is less accurate than average total earnings; it represents only the highest pay class in which the employee has qualified to work (Pet. App. 120a, 133a). Many whites with high JC numbers obtained prior to April, 1965 actually regularly worked in lower paying jobs because blacks with departmental seniority had superseded them after post April 1965 layoffs and recalls (Pet. App. 133a). The JC number does not reflect piecework incentive pay, which is substantial in some jobs, non-existent in others (Pet. App. 119a). It does not reflect overtime pay, which varies in different jobs. Certainly a better measure is average total annual pay for which by 1973 blacks had attained 96.8% of whites (Pet. App. 134a).

jobs in their departments (Pet. App. 43a-56a, 134a-135a), facts in the light of which the documentary history of the seniority system introduced in the last trial could be weighed and evaluated. Certainly the district court was justified in finding (Pet. App. 43a) that "This is not a situation . . . where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices." On the first appeal the Fifth Circuit commented on "the very substantial, good faith efforts of the employer and union working together to end racially segregated working practices" (Pet. App. 67a). The last panel of the Fifth Circuit saw a paper case, true. The district court saw the flesh and blood evidence of scores of witnesses, and the story which emerged from their testimony was of a company with a past perhaps not totally unsullied by the mores of bygone times, but from early 1965 on, with a dynamic and exemplary record of sound progress in race relations, a model for other employers, without a single case being shown of discrimination against any black individual.

CONCLUSION

The Company urges again the conclusion of its main brief.

Respectfully submitted,

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